UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEW VISTA NURSING AND REHABILITATION, LLC

and **Case 22-CA-029988**

1199 SEIU UNITED HEALTHCARE WORKERS EAST, NJ REGION

ORDER DENYING MOTION FOR RECONSIDERATION AND MOTION TO RECUSE

On August 26, 2011, the Board issued a Decision and Order in *New Vista Nursing & Rehabilitation, LLC*, 357 NLRB No. 69. On September 9, 2011, the Respondent filed a Motion for Reconsideration, which the Board denied on December 30, 2011. On January 3, March 14, and March 22, 2012, respectively, the Respondent filed its second, third, and fourth motions for reconsideration. By order dated March 15, 2012, the Board denied the Respondent's second motion for reconsideration, and by order dated March 27, 2012, the Board denied the Respondent's third and fourth motions for reconsideration.

On September 14, 2011, while the first motion for reconsideration was pending, the Board filed its application for enforcement in the United States Court of Appeals for the Third Circuit. Thereafter, the Respondent filed its cross-petitions for review.

At the time of the orders denying the Respondent's second, third, and fourth motions for reconsideration, the composition of the Board included three persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning,*

134 S. Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid.

By letter dated November 19, 2015, the United States Court of Appeals for the Third Circuit requested that the parties be prepared to address the following questions at oral argument:

1) For purposes of our jurisdiction under section 10(e) of the NLRA, what effect, if any, do pending motions for administrative reconsideration have on the finality of the order for which the NLRB seeks enforcement?

2) If the NLRB lacked a proper quorum at the time it filed the administrative record with the Court, why aren't we required, under section 10(e) of the NLRA, to remand the record to the NLRB so that it can take action via a properly constituted quorum?

3) In light of *New Process Steel, L.P. v. NLRB*, 560 US 674 (2010) and *NLRB v. Noel Canning,* 134 S. Ct. 2550 (2014), would remanding this case so that the NLRB may take action with a properly constituted quorum be the most efficient approach?

On December 2, 2015, in light of *NLRB v. Noel Canning* and the Court's questions referenced above, the Board filed a motion for limited remand of the administrative record to allow the current Board to address the Respondent's second, third, and fourth motions for reconsideration. In its answer to the Board's motion, also filed on December 2, the Respondent joined the Board's motion for limited remand, though it disagreed with the Board's additional request that the time period of the remand be limited to 30 days. On December 4, 2015, the Court granted the motion to remand but declined to limit the remand to 30 days.[1]

By order dated December 17, 2015, a panel of the current Board denied the Respondent's second, third, and fourth motions for reconsideration. By letter dated

[1] Per Sec. 10(e) of the National Labor Relations Act, the Court retained jurisdiction over this matter.

December 18, 2015, the Respondent filed its fifth motion for reconsideration and a motion to recuse Member Hirozawa.

In support of its fifth motion for reconsideration, the Respondent states that it "did not even know that the Board was considering the matter, or when it got it from the Court of Appeals." In support of its motion to recuse Member Hirozawa, the Respondent argues, *inter alia*, that because Member Hirozawa was partner in the law firm that represents the charging party in this matter prior to becoming chief counsel to then-Member Pearce in April 2010, he should be recused for that reason and for "whatever considerations caused recusal of Member Pearce."

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[2]

Having duly considered the matter, the Respondent's fifth motion for reconsideration is denied. The Respondent's suggestion that it was not aware that the Board was considering this matter is rejected. The Respondent knew that the Court of Appeals granted the Board's motion for a limited remand of the administrative record—which the Respondent joined—to allow the current Board to consider the Respondent's second, third, and fourth motions for reconsideration. By requesting that the remand be limited to 30 days, the Board made clear that it intended to act expeditiously. Moreover, there is no suggestion that the Respondent was prejudiced by the Board's prompt action in this matter. The Respondent's motion to recuse Member Hirozawa is also denied. Member Hirozawa's separate statement regarding the motion to recuse is attached.

[2] Chairman Pearce is recused and did not participate in the consideration of this matter.

Dated, Washington, D.C., January 5, 2016

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Philip A. Miscimarra, Member

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Kent Y. Hirozawa, Member

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Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

MEMBER HIROZAWA, ruling on motion for recusal.

By letter dated December 18, 2015, the Respondent has moved for my recusal in this matter. The Respondent contends that because for over twenty years I was a member of the law firm that represents the charging party in this matter and because then-Member Pearce recused himself from participation in this matter in 2011, when I was his chief counsel, my recusal is required. The motion is denied for the following reasons.

As an employee of the executive branch of government, I am bound by the Standards of Ethical Conduct for Employees of the Executive Branch, 5 CFR Part 2635, and by Executive Order 13490, Ethics Commitments by Executive Branch Personnel (Jan. 21, 2009). Under 5 CFR § 2635.502, "[w]here an employee knows that … a person with whom he has a covered relationship is or represents a party to [a particular] matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter [absent] authorization from the [agency ethics official]."

To the extent relevant here, an employee has a "covered relationship" with "[a]ny person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee." 5 CFR § 2635.502(b)(1)(iv). Executive Order 13490 effectively extends the one-year period of this definition to cover the two years preceding my appointment as a Board member.

The relevant facts are as follows: I was a member of the firm of Gladstein, Reif & Meginniss LLP, counsel for the charging party in this matter, for over twenty years. I withdrew from the firm in April 2010, prior to becoming chief counsel to then-Member Mark Gaston Pearce that month. I served as chief counsel to Member, and subsequently Chairman Pearce continuously until I was sworn in as a Board member in August 2013. During my time with the firm, I had no involvement with this matter or any other matter concerning the Respondent. During my service as chief counsel, I did not participate in the consideration of this matter at any time. My first involvement in the consideration of this matter concerned the Board's vote to file the December 2, 2015, motion for limited remand of the administrative record to allow the current Board to address the Respondent's second, third and fourth motions for reconsideration. That was more than five years after I had severed my relationship with my former firm.

In view of the foregoing, I have determined not to recuse myself from participation in this matter. I do not have a "covered relationship" within the meaning of 5 CFR § 2635.502 with any party or representative in this matter. In any event, my participation under the present circumstances would not "cause a

reasonable person with knowledge of the relevant facts to question [my] impartiality." 5 CFR § 2635.502(a). Likewise, my participation does not raise any issue under Executive Order 13490 inasmuch as this matter does not concern a former employer or former client as those terms are defined in Sec. 2(i) and (j), respectively, of the Executive Order. See *Regency Heritage Nursing and Rehabilitation Center*, 360 NLRB No. 98 (2014), slip op. at 1 fn. 1.

The motion for recusal is denied.

Dated, Washington, D.C., January 5, 2016

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Kent Y. Hirozawa, Member